

(1980) 10 BOM CK 0011
In the Bombay High Court
Case No : Second Appeal No. 703 of 1974

Krishnabai

APPELLANT

Vs

Dnyandeo Laxman Yeyale and Others

RESPONDENT

Date of Decision : 21-10-1980

Acts Referred:

Transfer of Property Act, 1882 — Section 8

Citation : AIR 1982 Bom 107

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : V.M. Limaye, for the Appellant; K.J. Abhyankar, D.R. Bamalakar and G.R. Rege, for the Respondent

Judgement

1. This second appeal is filed by original defendant No. 1 against the decree for possession passed against her by the learned. Assistant Judge, Satara. The original plaintiffs and defendant No. 2 are the respondents before me.

2. It will be useful to set out the genealogical table showing the relationship of the parties.

MADHAVRAO

|

| |

Laxman Ramu=Gunabai

| (died 7-11-97)

----- |

| | Krishnabal

Dnyandeo Dattu (Deft. No. 1)

(Plff. No. 1) (Plff. No.2)

From the genealogy it will be seen that Madhavrao had two sons Laxman and Ramu. Admittedly Ramu died before the year 1937. He had no male issue. His widow's name was Gunabai and his daughter was Krishnabai who was defendant No. 1 in the suit. Gunabai died on 7th Nov., 1967. Rama's brother deo Laxman (plaintiff No. 1) and Daturu Laxman (plaintiff No. 2).

3. The plaintiff's contention in the plaint was that at the time of the death Rama was joint with Laxman. According to the plaintiff on 4th Oct., 1907, a maintenance deed was executed by Laxman in favour of Gunabai and by Laxman in favour of Gunabai and by virtue of that maintenance deed a portion of land admeasuring 3 acres out of Survey No. 573 and one house were given to Gunabai for her maintenance during her lifetime. In the maintenance deed it was mentioned that she would be entitled to get the income of the property only. As a matter of fact initially the income of the property was given to her by Laxman himself by cultivating the property. But the provision was that if he failed to give such income she was to get possession of the land and was to get it cultivated herself. But there is no room for doubt left by the said document that during her lifetime Gunabai was to enjoy the property as owner, This is what is stated in the maintenance deed in this behalf.

"After your lifetime we will be owners of both these properties".

Thus, there is no room for doubt that during her lifetime she was the owner of the property but was to have only a widow's estate. In other words what was given to Gunabai was only a widow's estate in the said property by virtue of the said maintenance deed. It appears that in spite of the maintenance deed Gunabai was smarting under some grievance. Here exact grievance is to be found only from the documents she filed in Civil Suit No. 66/- 1915 on 9th Oct., 1916 against Laxman and his two sons i.e. the present plaintiffs. In that suit she maintained that the statements made in the impugned maintenance deed were not correct and that she came to know about those statements only subsequently. In the said suit i.e. Suit No. 66/1915 she claimed possession not only of Survey No. 573 but also of Survey No. 643 contending that there was already a partition between Laxman and Rama, that the suit property belonged to Rama exclusively and that after this death she had inherited the suit property. So far as the claim of Gunabai for the land Survey No. 573 was concerned, the Court passed a decree in favour of the plaintiffs as regards that land but the Court, for some reasons or the other, did not consider the plaintiffs claim to land Survey No. 643 in that suit. A decree was passed in the suit in Favour of Gunabai directing Laxman and the present plaintiffs to handover possession of the said portion of the land to her, leaving her right to claim the other land bearing S. No, 643 open. Gunabai files an application for execution of the said decree which was regular Darkhast No. 364/1917 and in that Darkhast there was a compromise arrived at between the parties. According to the compromise, though Gunabai was entitled as per the decree, to get a portion of land Survey No. 573. She was

given, instead, a portion of land admeasuring 2 acres and 20 gunthas from land Survey No. 634. But what is to be notice is that neither in the decree nor in the subsequent compromise there was any restriction placed upon Gunabai, so far as the enjoyment of the property was concerned. It may be mentioned here that so far as the Maintenance Deed (Exh. 51-A) was concerned, it is specifically mentioned in it that what was given by that Maintenance Deed to Gunabai was widow's estate. It is also mentioned that Gunabai was prohibited from making any alienation of the property by way of sold or mortgage etc. But neither the subsequent decree nor the subsequent compromise mentioned above put a restriction upon Gunabai to alienate the property during her lifetime nor did those two instruments in any way provide that what was being granted to Gunabai under the decree or under the compromise was only a limited widow's estate.

4. There is no dispute that the compromise was acted upon the Gunabai got the possession of land Survey No. 643/2-A admeasuring 2 acres and 20 gunthas and continued to be in possession of the same actually or constructively, till 15th Sep., 1943, when she executed a gift deed in favour of her daughter Krishnabai, defendant No. 1 in these proceedings, The plaintiffs. No doubt, contended that in spite of the gift deed Gunabai continued to be in possession of the suit land and that the defendant No. 1 had no right, title and interest in the same. Gunabai died on 17th Nov., 1967. The plaintiff therefore contended that they got the right of possession of this suit land on the said date of the death of Gunabai. They contended that Krishna had no right, title and interest on the property either by virtue of the gift deed or independent of the gift deed. So far as the gift deed was concerned their contention was that the gift deed was void upon Gunabai from making any alienation of the property by virtue of the deed or maintenance. So far as the right of the defendant No. 1 independent of the gift deed, was concerned, the plaintiffs' contention was that in the peculiar circumstances of the case Krishnabai could not be said to have become full-fledged owner of the suit land and license defendant No. 1 could not be said to have inherited the suit land from Gunabai, In the suit defendant No. 2 was impleaded because according to the plaintiffs his name was shown in the record of rights as a tenant. The plaintiffs contended that even if any rights were created in favour of defendant No. 3 by Gunabai they were extinguished with the death of Gunabai. They therefore contended that they were entitled to actual possession of the land in question from both the defendants.

5. Defendant No. 1 filed her written statement Ex. 18 and contended that the suit land belonged to Rama as his exclusive property. They challenged the validity of the Maintenance deed Exhibit 51-A contending that it was a false and fabricated document, brought about only to avoid the share of Gunabai in the property of her husband Rama. Defendant No. 1 contended that the gift deed dated 15th Sep., 1943 was fully acted upon and she was in possession of the suit land on the basis of the said gift deed. They contended that Gunabai was an absolute owner of the property and that there was nothing in the decree Exhibit

34 and the compromise Exhibit 47, by virtue of which the land became a limited estate in the hands of Gunabai, They contended that she perfectly competent to execute the gift deed in favour of defendant No. 1 and that hence the gift deed was a valid document.

6. Defendant No. 2 filed his written statement contending that he was a tenant of the land and was in possession of the same for the last 42 to 45 years. He contended that firstly his father was the tenant on the land even before, Gunabai had obtained possession of this land. He contended that after his father's death he himself became the rent of the land. He therefore contended that no decree for possession would be passed against him.

7. On these pleadings the issues were framed by the learned trial Judge, issue No. 2 was to the effect as to whether the plaintiffs proved that Gunabai was a limited owner in respect of the suit lands. The finding recorded by the learned trial Judge was that they had failed to prove the same. The learned judge arrived at the conclusion that there was nothing in the decree Exhibit 34, or the compromise Ex. 47, which showed that what was given to Gunabai under the said decree was only a limited estate of a widow, The learned Judge therefore held that Gunabai was an absolute owner of the suit land. Hence the learned judge held that the gift deed executed by Gunabai in favour of defendant No. 1 was a valid document and that her possession of the suit land as per the said gift deed was a lawful possession.

8. Issue No. 4 framed by the learned trial Judge is of some significance in this appeal. The issue framed by the learned trial Judge is as follows:-

Does defendant No. 2 prove that he is a tenant in the suit land since the time of his father?

After framing this issue the learned trial Judge referred the said issue to the Tenancy Court under S. 85-A of the Bombay Tenancy Act. Initially the Tahsildar made a report that according to the Tenancy Court defendant No. 2 was a tenant in respect of the suit land since the time of his father. But it appears that the present plaintiffs filed appeal to the Collection and the Appeal Court set aside the order of Tahsildar and remanded the case back to him. After the remand the Sub-Divisional Officer observed that the issue involved the question of title. He held that before deciding the question as to whether defendant No. 2 was a tenant of the land or not, the question of title of the land or not, the question of title of the person who let out the land to defendant No. 2 would have to be adjudicated upon. He therefore returned the question regarding the title of the person who let out the title of the person who let out the land to defendant No. 2. Therefore the trial Court was required to decide this but since the trial Court came to the conclusion that the plaintiffs themselves failed to prove their title to the suit land, and that defendant No. 1 proved here title to the same, the plaintiffs suit for possession had to be dismissed and hence according to the trial Court no separate answer to issue No. 4 was necessary. The trial Court therefore

dismissed the plaintiff's suit with no order as to costs.

9. In appeal the learned Assistant Judge took a different view. According to the learned Judge, what was given in Gunabai as per the decree Ext. 34, as well as, as per Compromise Ex. 47, was nothing but a limited estate. This view was arrived at by him by holding that the decree Ext. 245 was passed with a view to enforce the deed of Maintenance itself. After taking this view the learned Judge referred to and relied upon the provisions of S. 12(4) of the Hindu Succession Act and held that Gunabai's right could have been perfected into an absolute ownership under S. 14(1) of the Hindu Succession Act but he found that Gunabai was not "possessed" of the property at the time of the advent of the Hindu Succession Act within the contemplation of S. 14(1) of the said Act. He found that the property at that time was in possession of the defendant No. 2. He also referred to provisions of S. 14(2) of the Act and held that by virtue of the decree Gunabai had got only a limited held that even under S. 14(2) of the Hindu Succession Act Gunabai could not be said to have acquired absolute ownership of the suit property on the date when the Hindu Succession Act came into force. He therefore held that the defendant No. 1 had no title to the suit property after the death of Gunabai. He also held that even assuming that the property was separate property of Rama, the plaintiff being reversionary heirs are entitled to the suit land.

10. So far as defendant No. 2 was concerned the learned Judge noticed the fact that the reference was returned by the Tenancy Court but he did not think it necessary to make the reference afresh. He held that defendant No. 2 was a trespasser because Gunabai could not create a valid legal tenancy in his favour nor could defendant No. 1 create any legal tenancy in his favour. He therefore allowed the appeal and passed a decree for possession in favour of the plaintiffs against both the defendants.

11. The present appeal has been filed by the original defendant No. 1 against the said decree for possession. It may be mentioned here that no appeal as such was filed by the defendant No. 2 against the order for delivery of possession of the suit property. Having regard to the view that I am taking in the matter. The fact that the defendant No. 2 has filed no appeal, may be of no legal consequence. However, I might make a few observations in that behalf in the concluding portion of the judgment.

12. Coming to the main question as to whether the plaintiffs have proved their title to the suit lands Mr. Limaye the learned Advocate for the appellant contended before me, with some force, that assuming any right or title endured in favour of Gunabai by virtue of the Maintenance deed Ex. 51-A, Gunabai had not certainly claimed the right to suit property in Civil Suit No. 56/1915 on the basis of the said Maintenance deed. In fact Ext 34 passed in the said suit clearly shows that according to the said deed clearly shows that according to her the document that came to be executed was without her knowledge and she did not agree with the contents of the same at all. In fact she claimed that her husband

Rama was not living jointly with his brother Laxman and that both the lands Survey Nos. 573 and 543 were separate property of Rama. She, therefore, tiled a suit for possession not only of the said Survey No. 573 but also of Survey No. 643. It is the decree in this suit which is on record. The written statement filed by the defendant in that suit is not on record at all. No doubt the decree goes to provide that Gunabai would be entitled to possession of land Survey No. 573 and the decree does not give anything to Gunabai so far as the land survey 643 was concerned. But from this fact it cannot be inferred that the decree was one which enforced the maintenance deed by way of defence and the Court might have passed a decree on admission so far as the Survey No. 573 was concerned. It is significant that the plaintiffs' claim regarding Survey No. 643 was not at all rejected by the Court. It seems that the Court was willing to grant whatever was admitted by the defendant and the disputed claim was left to be adjudicated upon by them in an independent litigation. The point is that the decree nowhere mentions that the land Survey No. 573, the possession of which was to be received by Gunabai from Laxman and his sons, was to be had by her as widow's estate. I will presently discuss the effect of this decree which is an unqualified decree. What I want to point out here is that the learned Judge's plea that the decree created a limited estate in favour of the widow is not justified by the phraseology employed in the decree.

13. We then come to the compromise, which was arrived at between the parties in the Darkhast proceedings. I have mentioned above that in the Darkhast the parties arrived at a compromise by virtue of which Survey No. 573 which was to be taken possession of by the widow Gunabai was to be given to Lakshman and his sons, whereas a portion admeasuring two acres and twenty gundas out of Survey No. 643 was given to Gunabai. In a sense it can be legitimately said that this was a grant in favour of Gunabai. As a matter of fact it can be said that the decree created a grant in respect of Survey No. 572. Whereas the compromise created a grant in respect of land Survey No. 643. To the extent of 2 acres and 20 gunthas in favour of Gunabai in place of the other land. But the noteworthy feature is that even this compromise makes a grant of this Survey No. 642 in favour of Gunabai in an unqualified manner. The compromise by itself nowhere shows that what was contemplated by the compromise was to grant only widow's estate to Gunabai and not the absolute estate as contemplated by S. 8 of the Transfer of Property Act. Relying upon these facts Mr. Limaye contends that there is nothing to show the grant resulting from the decree Ext. 34 and Compromise Ex. 47 to show that Gunabai ever received a grant of widow's estate in respect of the suit land. He therefore contended that there is no basis for the time for the advent of the Hindu Succession Act, she did not become the full owner of the same by virtue of S. 14(1) of the Act. He contends that under S. 14(2) was in any way to affect an estate which was already an absolute estate. He therefore contended that Gunabai's executing a gift deed in favour of her daughter Krishnabai was legal and she was perfectly competent to do the same. He contended that the defendant No. 1 acquired a full title to the suit property by

virtue of her right. He contends that neither sub-sec (1) nor sub-sec (2) of S. 14 of the Hindu Succession Act had any relevance in the context of the facts of this case.

14. Mr. Abhyankar, the learned Advocate appearing for the plaintiff's on the other hand contended that the decree as well as the compromise must be deemed to have contemplated a grant of widow's estate only in favour of Gunabai. In this connection he relied upon the following observations of their Lordships of Privy Council in *Mahomed Shumsool v. Shewukram*. 1874 2 Ind App 7;

"In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus, with respect of the devolution of property. It may be assumed that a Hindu knows that, as a general rule, at all events women do not take absolute estates or inheritance which they are enabled to alienate." Relying upon these observations Mr. Abhyankar also referred to para 401 of the Commentaries of Mulla on Principles of Hindu Law. In fact the above observations have been annulled out from Cl. 2 of the said para 401 only. Relying upon these observations Mr. Abhyankar contended that when the decree Ext. 34 provided that Gunabai was to get possession of S. No. 573, what under he deemed to have been intended is that she was to get a widow's estate in respect of the suit lands. He however contended that so far as the compromise Ext. 47 was concerned all that was done by the latter document was to exchange one land for the other. I am afraid it will not be possible for me to agree with Mr. Abhyankar so far as this legal aspect of the matter is concerned. No doubt the above mentioned observations of the Privy Council do give rise to an inference of presumption in favour of holding that if a decree results in a grant in favour of a widow, the grant is presumed to be or an limited estate. But ought we know much water has been flown through the Ganges since the said P. C. Decision was given as early as in the last century in the year 1974. If not even earlier. But as against that decision have before me two Authorities of the Supreme Court wherein different view is expressed. The first one is *Nathoo Lal Vs. Durga Prasad*, wherein the Supreme Court observed as follows (at p. 358).

"It may be taken to be quite settled that there is not warrant for the proposition of law that when a grant of an immovable property is made to a Hindu female, she does not get an absolute or alienable interest in such property, unless such power is expressly conferred upon her. If an estate were given to a man without express words of inheritance, it would, in the absence of a conflicting context, carry, by Hindu law, an estate of inheritance. This is the general principle of law which is recognised and embodied in S. 8 of the Transfer of Property Act and unless it is shown that under Hindu law a gift to a female means a limited gift or carries with it the restrictions of disabilities similar to those that exist in a "widow's estate there is no justification for departing from this principle. There is certainly no such provision in Hindu law and no text could be supplied in support

of the same. The position, therefore, is that to convey an absolute estate to a Hindu female, no express power of alienation need be given, It is enough if words are used of such amplitude as would convey full rights of ownership."

15. It will be thus seen that according to the Supreme Court the tests laid down for constructing the words of grant in favour of a male and female under the Hindu law are not different. The words employed for a grant in favour of a male Hindu would connote the same meaning as those employed for the grant in favour of a female Hindu and vice versa. If this is the position, then what is necessary to be seen in as to whether the words of the decree that was passed by the Court in Civil Suit No. 66/1915 would spell a limited estate if the decree was passed in favour of a male plaintiff. Mr. Abhyankar contended that we have to take into account the circumstances in which the decree was passed. But in the first place I am not sure that there is much scope for such construction. There is nothing unequivocal or vague in the decree. The decree has to be read as passed. But in the first place I am not sure that there is much scope for such construction. There is nothing unequivocal or vague in the decree. The decree has to be read in the context of the law of the land which, as observed by the Supreme Court, is to be found in S. 8 of the T. P. Act no doubt contemplates the case of transfer inter vivos by the act of parties, but the principle is the same in respect of transfer mortis causa of one which materialises by virtue of any order or decree of a Court. There is no reason to assume that when the decree was passed giving Gunabai title to the suit property she was intended to be given limited estate and not full-fledged estate. I have before me another Authority of the Supreme Court reported in Ram Gopal Vs. Nand Lal and Others, Nathoo Lal Vs. Durga Prasad, the Supreme Court no doubt observed that there is no warrant for the proposition of law that when a grant of immovable property is made to a Hindu female, she does not get an absolute or alienable interest in such property unless such power is expressly conferred upon her. The Supreme Court held that the position is that to convey an absolute estate to a Hindu female no express power of alienation need be given: it is enough if words are used of such an amplitude as would convey the full right of ownership. We have only to see here in the decree Ext. 47 that there is no restriction whatsoever placed upon the rights of Gunabai when she was given initially the grant of land Survey No. 573 and later on the grant of land Survey No. 643/2. The words are of sufficient amplitude to convey an absolute estate, and there is nothing in the decree which in any way restricts Gunabai's property in the suit land to a widow's estate. I may mention here that while making the above observation the Supreme Court in fact considered and examined the effect of the Privy Council's decision in Mahomed Shumsool's case 1874 2 Ind App 7 referred to above and the judgment was given in spite of that case. It can, therefore, be safely said that the judgment in Shumsool's case is not longer good law in view of the above mentioned two Authorities of the Supreme Court.

16. Incidentally, I may also point out that in Ram Gopal Vs. Nand Lal and Others, , the property received by a Hindu female was under a gift deed for her

maintenance only. But in spite of this position the Supreme Court in that case came to the conclusion that merely because the properties of the gift was to provide for maintenance of the conclusion that merely because the properties of the gift was to provide for maintenance of the widow it would not mean that the extent of the property was widow's estate only. In the instant case, no doubt it is the case of the plaintiff that what was given to Gunabai was property for the sake of her maintenance. But when the land Survey No. 643 was given in lieu of the property mentioned in the Maintenance Deed it could not be said that what was intended to be given was only a limited estate. It would no doubt be perfectly open for the parties to lead evidence for proving the intention of the transfer while making the grant. But the fact that it was given with a view to facilitate the widow to maintain herself would not by itself given rise to a presumption that only limited estate was purported to be created.

17. In this view of the things, I am unable to agree with the view taken by the learned Assistant Judge that Gunabai was in possession of the suit land as a limited owner. The inference must be that if she was the owner of the land she had the right of absolute ownership in respect of the same. I may hasten to add that I am expressing this view only strictly in the context of the facts of this case where nothing is brought on record to show that a contrary intention was entertained by both the parties.

19. Having regard to this view that I have taken it is unnecessary to examine the correctness of the learned Judge's final decree against defendant No. 2 directing him to hand over the actual possession of the suit land to the plaintiffs. However I may make a few observations in this behalf. The contention of defendant No. 2 was that he was a tenant on the suit land for nearly 42 to 45 years before the date of the suit and that too even before Gunabai got possession of the land from Laxmana and the two present plaintiffs He contended that if was his father who was tenant of the land and thereafter as became the tenant and that the tenancy subsisted for a period of nearly 42 to 45 years. To my mind the Tenancy Court was not at all right in returning the reference on the ground that a question of title was involved. So far as the question of title was concerned, Gunabai's title from the date of compromise Ext. 47, fill the gift deed of the year 1943 was never is question. The position therefore, would be that if Gunabai had created the tenancy in her lifetime before the date of gift deed, the tenancy would be perfectly lawful one. It is only if Gunabai did not have an absolute estate, but had only a limited estate and it Gunabai had created a tenancy in favour of defendant No. 2 after the year 1943, that the question as to whether the tenant would be lawful tenant of not would be of some relevance. In the instant case the Tenancy Court actually recorded a finding in the first instance that the defendant No. 2 was a tenant since the time of his father. The impression that is gathered is that the contention of the defendant No. 2 that he was a tenant for nearly 45 years before the date of the suit is accepted by the Tenancy Court. The correctness of this view could no doubt be verified and examined by the Appellate Court but the Tenancy Court had no jurisdiction or

justification to send back the matter to the Civil Court. In any event the Civil Court could be said to be having no jurisdiction to pass a decree against the tenant if the tenant was inducted on the land by Gunabai before the year 1943. The view of the learned Assistant Judge that Gunabai and no power to create tenancy appears to be without any basis. No doubt the learned Judge appears to have been influenced by the prohibition contained in the Maintenance Deed Ext. 51-A forbidding Gunabai from alienating the land. But what the learned Judge lost sight of was that lands through the maintenance deed at all. Assuming she got any right flowing from the maintenance deed, the right merged in the decree in the first instance and in the compromise later on. Both those documents did not contain any restriction against any allegation by Gunabai. The learned Judge's view that defendant No. 2 was therefore a trespasser is a finding without jurisdiction. However, having regard to the facts that I have taken viz. That the plaintiffs, suit itself is liable to be dismissed for want of title, it is not necessary for the to pass any separate order in this behalf.

19. I may state that during the pendency of this appeal a stay has been obtained by the appellant defendant No. 1 and by virtue of the stay defendant No. 2 continues to be in possession of the suit property. No doubt by allowing this appeal, In substance I am setting aside the decree passed against the defendant No. 1 only because she alone has filed the appeal. But merely because defendant No. 2 did not file an appeal. I cannot allow the plaintiffs to take possession of the property from defendant No. 2 which property in fact belonged to defendant No. 1 .

20. In the result this appeal is allowed, the decree passed by the lower appellate Court is set aside and the one passed by the trial Court is restored. The heirs or respondent No. 1 shall pay the costs of this second appeal and that of the appeal in the lower appellate Court to the present appellant.

21. Appeal allowed.